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CHARLES ELMORE

IN THE
Supreme Court of the United States
October Term, 1948

No. 477

ALLIED PAPER MILLS, *ET AL.*,
Petitioners,

v.

FEDERAL TRADE COMMISSION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

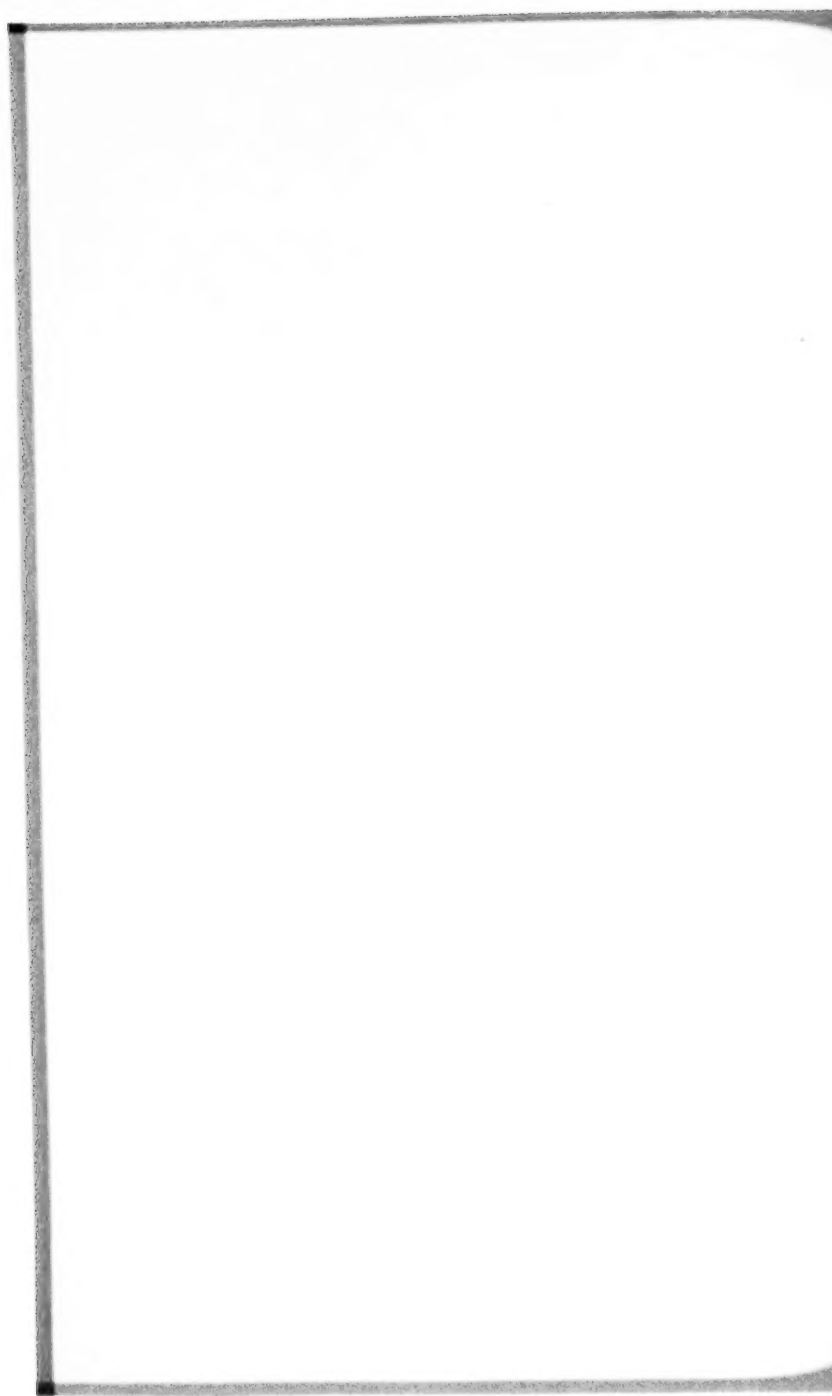
REPLY BRIEF FOR PETITIONERS

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February 10, 1949



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This brief is submitted in reply to the brief of the Federal Trade Commission filed herein on February 1, 1949.

**Questions Presented By the Petition For Writ
of Certiorari**

The four questions presented by the petition are set forth in Petitioners' Brief (p. 11). The Commission has ignored two of those questions and has misstated the others (Com. Brief, p. 2).

The Commission's first question states an issue not raised by the complaint. The conspiracy alleged was one to restrict, restrain and suppress competition in the sale and distribution of book papers, by agreeing to fix and maintain *uniform prices* to customers generally, and by agreeing on bids to be submitted to the United States Government (Pet. Brief, p. 6, R. 10). The Commission evades this main issue and predicates its entire argument on the contention

that the combination was a general one to restrain and suppress price competition in the sale of book paper. It reviews the evidence from this point of view, in its Statement (Com. Brief, pp. 3-10) and in its Argument, Point I (Com. Brief, pp. 10-16). However, the evidence reviewed not only fails to support the existence of price uniformity as charged in the complaint but it also fails to support the existence of a combination in general, or of practices concertedly followed, having the capacity, tendency and effect of suppressing "price competition".

The Commission's statement of its second question misses the point which appears in Petitioners' Question No. 1. The question is not whether Section 10 of the Administrative Procedure Act expands the scope of judicial review, but whether the Court below complied with the provisions of the Act in reviewing this case.

The Commission ignores Question No. 3: Whether, apart from the Administrative Procedure Act, the findings and order of the Commission are supported by substantial evidence; and Question No. 4: Whether the Court below erred in its definition of "substantial evidence". The Commission has failed to meet these points in its brief.

ARGUMENT

POINT I

We did not contend in the Court below that it should weigh the evidence in this proceeding, and we do not ask this Court to do so. We have present here, not questions of fact, but a question of law, namely: Was there substantial evidence in the record to sustain the Commission's essential findings of fact? We are asking this Court to

follow the course it adopted in *Labor Board v. Waterman Steamship Corp.*, 309 U. S. 206, relied upon by the Commission (Com. Brief, p. 11). There, the lower Court had set aside an order of the National Labor Relations Board on the ground that the record did not contain substantial evidence of violations of the National Labor Relations Act. This Court, on petition for certiorari, took the case for the purpose of determining whether the lower Court was correct in its conclusion. It reviewed the evidence, not to weigh it, but to determine "whether the evidence supported the findings of the Board * * *" (*National Labor Relations Board v. Waterman Steamship Corp.*, *supra*, p. 220).

Neither the *Dietzgen* case¹ nor the *Fort Howard Paper* case² (cited by the Commission on page 11 of its Brief as examples of cases where writs of certiorari were denied) is similar on its facts to the instant case. The *Dietzgen* case involved express admonition and agreement to adhere to NRA price-filing procedures, and express agreements not to deviate from filed prices. The *Fort Howard* case is clearly distinguishable (Pet. Brief, p. 22; this brief, pp. 5, 7).

Alleged Price Uniformity. In this proceeding the Commission and Court below relied solely on one statistical study, dealing with spot sales to merchants of standard grades of book paper, to establish that prices in actual sales were substantially uniform. That study was made at the request of the Commission and upon conditions prescribed by the Commission (R. 1919). It covered two weekly periods or considerably less than 1% of the time (approx-

¹ *Eugene Dietzgen Co. v. Federal Trade Commission*, 142 F. (2d) 321.

² *Fort Howard Paper Co. v. Federal Trade Commission*, 156 F. (2d) 899.

mately six years) during which the conspiracy is alleged to have existed (R. 10, 13). It dealt with prices of less than 28% of all book paper sold, and not with approximately 45%, as the Commission indicates (Com. Brief, p. 4).

We have discussed the evidence relied upon by the Commission and the Court below to establish the existence of substantial price uniformity (Pet. Brief, pp. 19-36). We pointed out that the additional evidence, statistical and otherwise, on this point fully supports our contention that the entire record establishes only that degree of price uniformity which would normally exist in a competitive market.

There is not a scintilla of evidence in the record to show substantial uniformity of *any* of the prices for book paper sold on contract, other than on bids to the Government, or in spot sales to others than merchants. As to Government bids, the uniformity had disappeared prior to the filing of the complaint (R. 211, 1405); and as to general contract business, the undisputed evidence establishes that there was no substantial price uniformity (R. 1158-59).

Trade Customs. The Commission argues that the trade customs, compiled and published by the Association in 1933, which contain certain price differentials, among other things, were the result of agreement. The Commission asserts that the 1936 publication of these trade customs made substantial changes in the earlier publication (Com. Brief, p. 12). These arguments have been answered (Pet. Brief, pp. 40-42). The Commission argues, further, that "even if it were true, as petitioners assert, that the 1936 publication was merely a more completely indexed reissue of its earlier publication, this post-NRA reaffirmation of agreements reached under the shelter of NRA was plainly illegal." (Com. Brief, p. 13). In support of this contention,

the Commission cites the *Dietzgen* case¹ and the *Ft. Howard Paper Company* case.² In the *Dietzgen* case, as in the *Ft. Howard Paper Company* case, there was no evidence of the existence of trade customs prior to NRA, and substantial evidence that they were adopted by agreement during NRA. The Commission's reliance upon these cases would have weight in this case only if the original compilation and publication of trade customs were the result of an agreement as to what those trade customs should be. The evidence in this case is wholly to the contrary.³

Furthermore, even if the NRA trade customs compilation had involved an agreement—which would of course have been lawful during NRA—the above cases do not apply, because in 1936 there was no agreement, but, in fact, the contrary. The record is replete with testimony to the effect that the trade customs were not employed except when their use was suitable to individual buyers and sellers.⁴

Quantity and Grade Differentials. The Commission in its Statement refers to quantity and grade differentials: It admits that the record does not show when these differentials originated, and only suggests that they have been changed or continued by cooperative action (Com. Brief, p. 6). We have discussed in our principal brief the extent to which quantity and grade differentials bear upon the issues here (Pet. Brief, pp. 48-49).

¹ *Eugene Dietzgen Co. v. Federal Trade Commission*, 142 F. (2d) 321.

² *Fort Howard Paper Co. v. Federal Trade Commission*, 156 F. (2d) 899.

³ R. 50, 97, 114, 484-5, 505, 586, 613-14, 640, 667, 737-38, 804, 829, 871-72, 926, 940-41, 1023, 1070, 1201-02, 1256, 1327, 1343, 1374, 1375-76, 1394, 1442-43, 1517-18, 1523-24, 1531-32.

⁴ R. 174, 213, 446, 448, 504, 530, 548, 710, 720, 755-56, 800, 854, 878-79, 1023, 1054, 1091, 1215, 1256, 1374, 1424.

Zoning. The Commission contends that a zoning system was adopted during NRA and was continued by agreement after the termination of NRA. We have answered this contention (Pet. Brief, pp. 43-46). The Commission refers to certain exhibits to indicate "The zone system was recognized and correlated with other Association action" (Com. Brief, p. 14, footnote 4). These exhibits demonstrate only that the zone method of selling was in somewhat general use by the end of 1935, and that this fact was recognized. These exhibits establish nothing as to the inauguration of the zone method or the basis for its continuance after NRA.

The Court below recognized that, although the zone method came into general use, it was applied with varying uniformity (R. 2287, Pet. Brief, p. 46). In addition, the Court below must have concluded that the evidence relating to the continuation of the zone method was of a tenuous nature, for it postured its decision upon the following proposition:

"Moreover, a uniform participation by competitors in a particular system of doing business, where each is aware of the other's acts and where the effect is to restrain commerce, is sufficient to establish an unlawful conspiracy" (R. 2287).

We submit that this "legal-economic" doctrine is erroneous. It was challenged in our principal Brief (pp. 46-47). This doctrine was first enunciated in *Triangle Conduit & Cable Co., Inc., et al. v. Federal Trade Commission*, 168 F. (2d) 175. In that case this Court granted certiorari on January 31, 1949, to review the question raised by the doctrine above stated. *Clayton Mark & Co., et al. v. Federal Trade Commission*, 17 U. S. L. W. 3225.

With respect to what it refers to as the "zone system" and "the system of price differentials", the Commission

has made unwarranted assumptions, in the proposition quoted below :

“When more than 40 manufacturers quote identical basic prices and employ both an identical zone system of pricing and an identical and complex system of price differentials, the inference of agreement is irresistible” [citing cases]. (Com. Brief, p. 11.)

In all the cases cited by the Commission in support of this proposition, the price lists contained prices at which the commodities of those industries were actually sold, with inconsequential exceptions, and not merely quoted, as in the instant case. This constitutes an essential distinction between this case and the cases cited by the Commission.

The record in this case establishes that trade customs, the zoning method of selling, and the general identity of price *quotations* of standard grades of book paper to merchants, were no bar, singly or collectively, to price competition. It is true that there was a general use of certain trade practices and selling methods, not inaugurated by agreement or with any understanding that they would be adhered to. It is true, also, that there were practices and methods used by companies, individually, with knowledge that other companies were generally using the same or similar practices, subject to deviation by anyone at any time. We submit that such general use of these trade practices was the controlling factor in the decision of the Court below and that it followed the erroneous “legal-economic” doctrine that such use was sufficient to establish an unlawful conspiracy. Therefore, the question presented for the review of this case is not different from that presented in *Clayton Mark & Co., et al. v. Federal Trade Commission*, certiorari granted, 17 U. S. L. W. 3225.

POINT II

The Commission has not attempted to meet the petitioners' point that the Court below in this case failed to comply with the substantial evidence rule contained in Section 10(e) of the Administrative Procedure Act. Instead, the Commission has indulged in an irrelevant discussion of whether that rule is the same as the substantial evidence rule applied by some courts prior to the enactment of the Administrative Procedure Act (Com. Brief, pp. 17-21).

As petitioners have shown in their main brief (pp. 13-19), Section 10(e) of the Administrative Procedure Act is the controlling statute with respect to the scope of judicial review of the actions of administrative agencies. It requires that the reviewing court shall hold unlawful and set aside agency findings and conclusions that are unsupported by substantial evidence; and that, in making its determinations in that regard, the Court shall review the whole record, or such portions thereof as may be cited by any party. The legislative history of this section of the Act reveals the Congressional intent (a) to reform the practice of administrative agencies of relying upon something less than substantial evidence—suspicion, surmise, implications or plainly incredible evidence, and (b) to place upon reviewing courts the duty of reviewing the whole record in order to form an independent judgment as to whether the administrative findings are supported by substantial evidence—a duty not to be fulfilled by searching the record “to see whether it is barren of any evidence, or lacking any vestige of reliable and probative evidence, or supports the agency action by a scintilla or by mere hearsay, rumor, suspicion, speculation or inference” (Sen. Doc. No. 248, 79th Cong., 2d Sess., p. 370).

That the Court below did not comply with the requirements of Section 10(e) of the Administrative Procedure Act has been demonstrated in petitioners' brief (pp. 57-64). The Court did not refer to its duties under the Act, although it emphasized its interpretation of the limitations on the scope of its review. The Court did not review the whole record, but looked only to the evidence relied upon by the Commission; it accepted the inferences of the Commission although the facts upon which they were based equally supported contradictory inferences, and despite the fact that the Commission's inferences were rebutted by other undisputed evidence.

It is the failure of the Court below to comply with the Act, by which petitioners are aggrieved. Whether the Act expands the scope of judicial review, or whether it is declaratory of pre-existing law is, therefore, not the fundamental question. Petitioners' point is that the Court below failed to comply with the statute, and therefore did not afford the petitioners the judicial review of the Commission's action to which they were entitled.

The Commission argues that Section 10(e) merely "adopts the language traditionally used" in stating the substantial evidence rule (Com. Brief, p. 18); but thereafter, the Commission recognizes that there were two different rules being applied at the time the statute was enacted, and argues that the Congress adopted the substantial evidence rule applied by some courts as opposed to the rule applied by other courts. The cases cited by the Commission (Com. Brief, pp. 20-21) in support of its proposition that Section 10(e) is "merely declaratory of well-established principles" do not support that proposition.

The Commission argues that the Court below has insulated itself from review by this Court by citing in its opinion

Federal Trade Commission v. Algonc Lumber Co., et al., 291 U. S. 67, 73 (1934) and *Federal Trade Commission v. Pacific States Paper Trade Association*, 273 U. S. 52, 63 (1927) (decided before the Administrative Procedure Act) which contain very general and summary statements of the rule that reviewing courts will not weigh the evidence. But that rule should not be allowed to interfere with the duty of a reviewing court under the Administrative Procedure Act to review the whole record to determine whether the findings are supported by substantial evidence.

In *Bridges v. Wixon*, 326 U. S. 135 (1945) Chief Justice Stone dissented from the majority opinion because he felt the administrative finding should not be set aside. He said in that regard (p. 178):

“We cannot rightly reject the administrative finding here and accept, as we do almost every week, particularly in our denials of certiorari, the findings of administrative agencies which rest on the tenuous support of evidence far less persuasive than the present record presents.”

In presenting the Administrative Procedure Bill to the House of Representatives, Congressman Walter, Chairman of the House Judiciary Committee in charge of the Bill, called attention to Chief Justice Stone's remarks and said:

“Under this bill it will not be sufficient for the Court to find, as the late Chief Justice Stone pointed out within the year, merely that there is some ‘tenuous support of evidence’” * * * (Sen. Doc. No. 248, 79th Cong., 2d Sess., p. 370).

The Commission does not take cognizance of the intent of Congress, thus expressed, to reform administrative practice; it contends that Section 10(e) of the Act is meaningless and superfluous. The Commission pays no atten-

tion to the fact that the substantial evidence rule is the dividing line between law and arbitrary power (*National Labor Relations Board v. Thompson Products, Inc.*, 97 F. (2d) 13, 15 (C. C. A. 6th, 1938)); in effect, it argues that the Commission's findings shall be conclusive, no matter how tenuous the evidence upon which they are based.

It is submitted that the Commission's view of the Administrative Procedure Act is erroneous; that the Court below failed to comply with its provisions; and that petitioners have thereby been deprived of their right to judicial review.

Conclusion

It is respectfully requested that this Court exercise its supervisory powers and that the writ be allowed.

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